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No. 93-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC ERNDT,
INTERNATIONAL CASTING SUPPLY, INC.,
BODO MORGENSTERN,
SHELLCAST FOUNDRIES, INC.,
AND INTERBOCO INDUSTRIES,

Petitioners,

vs.

PRE-VEST, INC.,
and
CONLEY CASTING SUPPLY CORP.

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLASS P. COBLE, ESQ.
Counsel of Record
20525 Center Ridge Road
Suite 604
Rocky River, Ohio 44116
(216) 333-8500

Attorney for Respondent,
Pre-Vest, Inc.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a post-judgment order granting a motion to alter or amend a judgment pursuant to Fed. R. Civ. P. Rule 59 (e) is "final" and thus immediately appealable to the United States Circuit Court of Appeals for the Sixth Circuit under 28 U.S.C.A. § 1291.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The caption of the case in this Court lists all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed.

Respondent Pre-Vest, Inc. ("PVI") is an Ohio Corporation located in Euclid, Ohio. PVI has no parent corporation, affiliates or wholly owned subsidiaries to be listed pursuant to Rule 29.1.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pre-Vest, Inc. respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit entered March 3, 1994 and the order denying the petition for rehearing en banc entered April 29, 1994

JURISDICTION BELOW

Jurisdiction in the District Court was initially based on diversity of citizenship under 28 U.S.C.A. § 1332. The Com-

plaint, as amended without altering the factual allegations, alleges Federal question jurisdiction under 28 U.S.C.A. § 1331(a).

Appellate jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 28 U.S.C.A. § 1291 (1982).

STATEMENT OF THE CASE

A. Summary of the Facts

Respondent Pre-Vest, Inc., is engaged in the blending of materials used by its customers to create ceramic molds for the casting of metals. Petitioner Eric Erndt was a former employee of the Respondent entrusted with confidential and proprietary information including Respondents' formulas which were considered trade secrets. Petitioner International Supply Casting, Inc. is a Canadian entity now employing Eric Erndt in competition with Respondent. Bodo Morgenstern, Shellcast Foundries, Inc., and Interboco Industries are related entities having Bodo Morgenstern as a common denominator.

Following Erndt's departure from Respondent, International Casting Supply, Inc. began manufacturing and selling Respondents' formulas to Respondents' customers. On November 28, 1988 in United States District Court, Northern District of Ohio, Eastern Division, respondent initiated an action for conspiracy and theft of trade secrets.

B. Procedural History

On November 23, 1988, Respondent, Pre-vest, Inc. ("PVI"), brought this action in the United States District Court for the Northern District of Ohio. The Complaint alleged subject matter jurisdiction based on complete diversity of the parties under 28 U.S.C.A. § 1332. In asserting diversity jurisdiction, PVI believed that defendant Eric Erndt was a Canadian and not a United States citizen. Because Erndt is allegedly a "stateless" citizen of the United States, Petitioners moved to dismiss the

Complaint on November 30, 1992 (more than four years from the start of the action) based on lack of subject matter jurisdiction. Defendant Conley joined in the motion to dismiss. The District Court granted Petitioners' motion and entered a judgment on January 27, 1993.

PVI filed a timely motion to alter and amend a judgment pursuant to Fed. R. Civ. P. 59(e). PVI argued that Section III of its original Complaint implied a Sherman Antitrust Act violation, and as such, the court should acknowledge a Federal question and let the case proceed. The District Court agreed. On April 1, 1993, based on its authority under Fed. R. Civ. P. 59(e), the District Court granted PVI's motion and allowed leave to amend the Complaint to allege a violation of the Sherman Antitrust Act. (*See* Appendix to Petition for Writ of Certiorari, hereinafter referred to as "App.", at A6-7.) No new facts were alleged by PVI. The only change to PVI's Complaint was to add an additional theory of liability based upon the Sherman Antitrust Act.

Petitioners and Conley appealed the District Court's order of April 1, 1993 to the United States Court of Appeals for the Sixth Circuit. The appeals were dismissed sua sponte by the Court of Appeals by an order entered March 3, 1994 for lack of subject matter jurisdiction (*see* App. at A3-5). A petition for rehearing en banc was denied by the Court of Appeals by an order entered April 29, 1994 (*see* App. at A1). Petitioners now ask this Court to review the Court of Appeals' decisions.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Present An Important or Novel Question of Law Which Warrants Review By This Court.

Contrary to what Petitioners want you to believe, the Court of Appeals did not address a novel question in dismissing Petitioners' appeal for lack of appellate jurisdiction. Under

U.S.C.A. § 1291, the Court of Appeals has jurisdiction of appeals from all *final* decisions. The appeals at issue were not based on a final decision (*see infra* at p. 7) and, thus, were properly dismissed.

1. **Federal District Courts Can Utilize Rule 59(e) to Review Dismissals Based on Lack of Subject Matter Jurisdiction.**

    a. **No Distinction is Drawn in Rule 59(e)'s Application When Dealing With a Motion to Dismiss Based on Lack of Subject Matter Jurisdiction.**

On January 27, 1993, the District Court granted Petitioners' motion to dismiss the Complaint based on lack of subject matter jurisdiction (*see* App. at A8). Within the ten (10) day time limit provided for under the Federal Rules of Civil Procedure, Respondent filed a motion to alter or amend judgment under Rule 59(e). The proposed amendment did not alter the factual allegations of the original complaint. Respondent simply argued that the facts, as alleged, gave rise to a Federal question, namely, whether Petitioner violated the Sherman Antitrust Act. At that point, the District Court reviewed: i) its judgment, ii) Respondents' Brief in Support of Motion to Amend the Judgement, and iii) the record as a whole, and determined that it had erred in originally granting the motion to dismiss. Thus, it granted Respondent leave to amend the complaint to allege a violation of the Sherman Antitrust Act (*see* App. at A6-7).

Petitioners are attempting to argue that by dismissing the action based on lack of subject matter jurisdiction, the Federal District Court lost its ability to review its judgment under Fed. R. Civ. P. 59(e) (hereinafter, "Rule 59(e)"). This argument is ludicrous and has no basis in law.

The District Court acted within the authority granted to it under Federal Rules of Civil Procedure. Since at least 1946,[1] courts at all levels have been utilizing Rule 59(e) to monitor their judgments and amend or correct them as needed. The Ninth Circuit in *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982), succinctly states that Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process and any motion which enables the trial judge to reconsider the validity of the judgment and to vacate or alter the judgment as he sees fit is valid. Neither the drafters of Rule 59(e) nor the courts interpreting it have drawn a distinction in its application when dealing with a motion to dismiss based on lack of jurisdiction.

b. The Interplay Between Rule 59(e) and Fed. R. App. P. Rule 4(a)(4) Indicates that District Courts Are Intended to Review Their Judgments.

The pertinent portion of Fed. R. App. P. Rule 4(a)(4) (hereinafter "FRAP Rule 4(a)(4)") provides:

> "(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the District Court by any party:... (iii) under Rule 59 to alter or amend the judgment..., the time for appeal for all parties shall run from the entry of the order... granting or denying [the] motion.

The interplay between Rule 59(e) and FRAP Rule 4(a)(4) suggests that District Courts are intended to review their judgments, regardless of whether such judgments are dismissals

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[1] Rule 59(e) was added to Rule 59 by amendment in 1946. The Committee Note of 1946 to added subdivision (e) provides: "This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944), and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry."

based on lack of subject matter jurisdiction. It also addresses the question, at what point is the finality test of 28 U.S.C.A. § 1291 applied for purposes of an appeal from a Federal District Court? The answer is that a post-judgment motion suspends the appealability of the original judgment until a decision is made on the motion. *Smith v. Insurance Co. of North America*, 213 F. Supp. 675, aff'd in part rev'd in part both on grounds (C.A. 6 Tenn) 334 F.2d 673, cert. den. 380 U.S. 915, 13 L. Ed. 2d 801, 85 S. Ct. 895 and later app. (C.A. 6 Tenn) 397 F.2d 889, cert.den. 393 U.S. 1018, 21 L. Ed. 2d 563, 89 S.Ct. 623, *Century Laminating, Ltd. v. Montgomery*, (C.A. 10 N.M.) 595 F.2d 563, cert. gr. 444 U.S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204, cert. dismissed 444 U.S. 987, 62 L. Ed. 2d 417, 100 S. Ct 516.

This Honorable Court, in *Osterneck v. Ernst & Whitney*, 109 S. Ct. 987 (1989), discussed this interplay and stated that Rule 59(e) and FRAP Rule 4(a)(4) work together to implement the finality requirement of 28 U.S.C.A. § 1291 by preventing the filing of an effective notice of appeal until a Federal District Court *has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment.*

In other words, if a motion to alter or amend a judgment is timely filed, the time to appeal runs from the entry of the order granting or denying such a motion.[2] If the motion is granted, a new judgment (the "New Judgment") is entered, unless the alteration or amendment leaves one or more issues to be determined. *See* 6A Moore's Federal Practice ¶ 59.15[4].

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[2] In order to avoid confusion and to prevent harsh results, the courts have generally held that regardless of its label, any motion made within ten (10) days of entry of judgment which seeks substantive changes in the judgment, will be considered a Rule 59(e) motion which suspends the appealability and, thus, the finality of the judgment. *See* 6A Moore's Federal Practice ¶ 59.12[1], *citing Kladis v. Brezek*, 823 F.2d 1014 (7th Cir. 1987), *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), and *Huff v. Metropolitan*, 675 F.2d 119 (6th Cir. 1981).

The issue of finality is then directed at the New Judgment. If this New Judgment is final, it is subject to appeal to the Court of Appeals, Thus, in the case at hand, the issue become whether the New Judgment, i.e., allowing leave to amend the complaint and denying the motion to dismiss, is a final appealable order. It is a steadfast principal that denials of motions to dismiss, even when based on jurisdictional grounds, are not final, appealable orders.

2. A Denial of a Motion to Dismiss, Even If Based on Jurisdictional Grounds, Is Not a Final Order.

Only "final" orders are appealable to the Circuit Court of Appeals under 28 U.S.C.A. § 1291. Denials of motions to dismiss are not final orders. A timely motion under Rule 59(e) may be used to amend a judgment dismissing a complaint for lack of diversity jurisdiction. Until the District Court denies said motion, an appeal is not ripe. (*See, Miller v. Leavenworth-Jefferson Electric Cooperative, Inc.*, 653 F.2d 1378 (10th Cir. 1981).) Furthermore, the trial court must have had jurisdiction to make the order; if not, it was acting without power and was therefore incapable of destroying the finality of its own judgment. (*See Gilliland v. Lyons*, 278 F.2d 56 (9th Cir. 1960).) If the court has no jurisdiction it has no power to enter an order saying so. This would prevent any appeal from a non-existent order. Such an argument is ludicrous.

This Honorable Court in *Catlin v. United States*, 324 U.S. 229 (1944), enunciated this principal and stated, "... denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." 324 U.S. at 236. In addition, the Sixth Circuit has also followed this principal. *See, e.g., Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988) ("[I]t is hornbook law that denial of a motion to dismiss is nonfinal and noncollateral." 846 F.2d at 1039), and *Chereton v. United States*, 256 F.2d 576 (6th Cir. 1958).

B. Petitioner's Reliance on Phillips v. Negley is Blatantly Misplaced.

This Honorable Court's decision in *Phillips v. Negley*, 117 U.S. 665 (1885), and all cases citing to it[3] enunciate the principal that a court cannot set aside or alter its final judgment *after the expiration of the term at which it was entered.* This Honorable Court, citing *Bronson v. Schulten*, 104 U.S. 415, stated:

> "But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision." 117 U.S. at 673.

In the case at hand, we are clearly not concerned with whether or not the Federal District Court for the Norther District of Ohio attempted to alter its judgment *after the expiration of its term.* Petitioners' own Writ states that the order at issue was void unless a motion to vacate judgment was made in the prior term. *See* Petitioners' Writ at p.7. Thus, the District Court's order dismissing the Complaint was not "beyond its control" when Respondent filed its timely Rule 59(e) motion. Thus, *Phillips v. Negley* was incorrectly relied upon by Petitioners. However, even under the principals set forth in that case, Respondent clearly took steps during the term of the court, by motion or otherwise, to set aside the court's judgment.

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[3] *See*, e.g., *United States v. United States*, 38 F. Supp 610 (1941).

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted

DOUGLASS P. COBLE, ESQ.
Counsel of Record
20525 Center Ridge Road
Suite 604
Rocky River, Ohio 44116
(216) 333-8500

Attorney for Respondent,
Pre-Vest, Inc.

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